

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 18, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3249-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGELO T. KASZUBA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: NANCY E. WHEELER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Angelo T. Kaszuba appeals from a judgment of conviction of armed robbery while masked and from an order denying his postconviction motion based on alleged ineffective assistance of trial counsel. We conclude that Kaszuba was not prejudiced by the alleged deficient performance of trial counsel. We affirm the judgment and the order.

Kaszuba was charged with robbing the First Bank Southeast of Racine at 12:55 p.m. on March 8, 1994. He argues that trial counsel was deficient for not investigating and substantiating at trial that he presented a pharmacy prescription at 12:10 p.m. that day after leaving a Milwaukee dental clinic. He also claims that trial counsel should have investigated the amount of time it normally took the pharmacy to fill a prescription over the noon hour on a weekday.

It is undisputed that on March 8, 1994, Kaszuba had a tooth extracted at a Milwaukee dental clinic. The treating dentist indicated that Kaszuba left the clinic between “before twelve noon” and 12:40 p.m. An agent of the FBI testified that the bank was a forty-one minute drive from the dental clinic.

The trial court denied admission of the FBI report relating information obtained by dental clinic employee Susan Atkins from a pharmacy clerk. On March 14, 1994, the FBI agent spoke with Atkins to get records about Kaszuba’s visit to the clinic. Atkins contacted the pharmacy located in the same hospital as the dental clinic and was told by a clerk there that Kaszuba’s prescriptions were ordered at 12:10 p.m.¹ Atkins made a notation of this information on a slip of paper. The FBI report recited that “Atkins contacted the hospital pharmacy and determined that at 12:10 p.m. on March 8, 1994, Kaszuba presented a prescription for Percocet and Penicillian [sic] to be filled.”

¹ Apparently the pharmacy clerk was able to find the “routing slip” or “tracking memo” that the pharmacy prepares when a prescription is presented. The document is kept for only one week by the pharmacy. The FBI agent did not ask for the document pertaining to Kaszuba’s prescriptions and the document was destroyed after the pharmacy clerk’s conversation with Atkins.

Neither the pharmacy clerk nor Atkins was called by the defense at Kaszuba's trial. As a result, there was no evidence at trial that the prescriptions written for Kaszuba were submitted to the pharmacy at 12:10 p.m. The trial court ruled that trial counsel was not ineffective because the evidence which counsel failed to pursue no longer existed or would not have been admissible because it contained multiple hearsay.

Kaszuba first argues that the FBI investigative report and Atkins' note are admissible evidence. Kaszuba never attempted to admit into evidence Atkins' note. Any potential evidentiary error in not admitting that note is not preserved for appeal as an independent ground for a new trial.

We will assume without discussion that the FBI report was admissible evidence. Whether the trial court's refusal to admit that report is harmless error is subsumed in our analysis of whether Kaszuba was prejudiced by trial counsel's allegedly deficient conduct. We turn to that issue.

"There are two components to a claim of ineffective trial counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." *State v. Smith*, 207 Wis.2d 259, 274, 558 N.W.2d 379, 386 (1997) (citation omitted). If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. See *State v. Kuhn*, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993). Here, we move directly to the second prong of the test because we conclude that Kaszuba was not prejudiced by his trial counsel's performance.

Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. See *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). "[P]roof of prejudice requires a showing that the defendant was deprived of a fair proceeding whose result is reliable." *Smith*, 207 Wis.2d at 276, 558 N.W.2d at 387.

Evidence that Kaszuba's prescription was presented to the pharmacy at 12:10 p.m. on the day of the bank robbery does not render the evidence at trial patently incredible. Kaszuba had no evidence that he was the person who submitted the prescription or that he waited for the prescription to be filled.² Moreover, even if Kaszuba was in the pharmacy at the documented time of 12:10 p.m.,³ he still had time to make the forty-one minute drive to the bank and arrive there at 12:55 p.m.

Other evidence of Kaszuba's guilt was strong. The bank teller indicated that the robber looked like he had cotton in his mouth as if "he had just come from the dentist and he had his tooth, teeth pulled." The teller noticed that the robber was unshaven and his voice was muffled. Kaszuba's dentist testified that she had placed a large wad of cotton in Kaszuba's mouth to stop the bleeding and that the cotton would have muffled his voice. The dentist also said that Kaszuba had a "scrubby beard" when he came to her clinic. Although the bank teller could not identify Kaszuba as the robber, Kaszuba's sister was shown the bank's surveillance video and identified Kaszuba as the robber.

² Without this evidence, it makes no difference how long it typically took the pharmacy to fill prescriptions over the noon hour on a weekday.

³ The postconviction motion hearing revealed that there would be some uncertainty as to whether Kaszuba was actually in the pharmacy at 12:10 p.m. or if other customers were ahead of him and that was the time the prescription was picked up by a clerk to be filled.

The bank teller gave the robber approximately \$200 in one hundred dollar bills, \$200 in fifty dollar bills, \$500 in twenty dollar bills, and \$200 in ten dollar bills. The day after the robbery Kaszuba exchanged \$600 in twenty dollar bills for one hundred dollar bills at another Racine area bank. Kaszuba's bank transaction the next day was significant because he told the FBI agent that he did not have enough money to pay the \$2 parking fee at the dental clinic. Kaszuba also admitted to the agent that he had a crack cocaine habit. A reasonable inference is that Kaszuba had a motive for the robbery and had the money he exchanged the next day as a result of the robbery.

Our confidence in the outcome of the trial is not undermined by trial counsel's failure to pursue evidence suggesting that Kaszuba was in the pharmacy at 12:10 p.m. on the day of the robbery. See *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711, 719 (1985) (counsel's error is prejudicial if it undermines confidence in the outcome). Kaszuba was not prejudiced by trial counsel's allegedly deficient performance. Likewise, the trial court's error in refusing to admit the FBI report was harmless error.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

